IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 929 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHIKHAJIRAV RAMRAV KOLE

Versus

STATE OF GUJ.

Appearance:

1. Criminal Appeal No. 929 of 1992

MRS SHILPA J UNWALLA for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

MR DP JOSHI, APP for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 03/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. By filing this appeal under Section 374 (2) of the Code of Criminal Procedure, 1973, the appellant has challenged legality of judgment dated August 19, 1992 rendered by the Ld. Addl. Sessions Judge, Baroda in Sessions Case No. 3/1992, by which he is convicted of the offence punishable u/S. 302 of the Indian Penal Code and punished with rigorous imprisonment for life and fine of Rs.2,000/-, in default RI for three months.

2. The appellant was residing on second floor of the house belonging to one Rajnibhai with his wife and children. The house was situated in Gopaldasni Gali, Fatepura, Vadodara. The appellant was employed as a driver with State Road Transport Corporation and was on leave from September 19, 1991. The name of the wife of the appellant was Madhuben, whereas name of daughter of the appellant was Bhavika and name of his son was Lalo. Just near the house of the appellant, witness Satishchandra Dinanath Sharma was residing. The appellant had suspicion that his wife Madhuben had illicit relations with Satishchandra Sharma and that he had not fathered daughter Bhavika. Because of this suspicion, quarrels used to take place between the appellant and his wife Madhuben as well as between witness Satishchandra Sharma and his wife Vimlaben. The incident in question took place on September 22, 1991 between 13-30 to 14-00 hours. Incidentally September 22, 1991 was Ganesh immersion day and as Fatepura area of Vadodara city was communally sensitive, a police Bandobast was arranged. It is the case of the prosecution that because of the suspicion regarding character of his wife, the appellant committed murder of his wife and daughter Bhavika by inflicting innumberable blows with a dagger. The people of the Faliya in which the appellant was residing after return from Ganesh immersion procession learnt that the appellant had killed his wife and daughter and, therefore, witness Hasumatiben, witness Rajnikant, witness Amarsinh, witness Satish Sharma and others had collected near the house of the appellant. At that time the appellant was found sitting in gallery of his house and though those who had collected near the house of the appellant had raised shouts calling out the names of wife and daughter of the appellant, they had not received any reply. Therefore, witness Satishchandra and others had tried to go to the house of the appellant through staircase, but the appellant had closed the doors from inside. Satishchandra and others had thereupon come down and gone

to call witness Vandanaben, who is sister of the appellant and who was residing at the relevant time in Wadi area of Vadodara city. After contacting Vandanaben witness Satishchandra had informed her that they had heard that the appellant had killed his wife and daughter by inflicting knife blows and, therefore, she should immediately come. Meanwhile a police party on patrol was passing in a jeep near the house of the appellant and on seeing a small crowd having collected, had stopped near the house of the appellant and made inquiries as to why people had collected there. After making the inquiries, police personnel had gone upstairs and asked the appellant to open the doors but the appellant had refused to open the doors. Therefore, the police had threatened to break open the doors and thereupon the appellant had opened the doors. On entering the house of the appellant, the police and witnesses had seen dead bodies of wife and daughter of the appellant lying on the floor and covered with a bed sheet. The appellant was thereafter brought down and at that time Vandanaben had also arrived at the house of the appellant. On inquiry being made by Vandanaben, the appellant had told her that he had become victim of suspicion. Thereafter, Vandanaben in the company of police personnel had gone to Fatepura Police Chocky where her complaint was reduced into writing by Police Inspector Raysinh Shivubha Gohil. The complaint lodged by Raysinh was thereafter sent to City Police Station, Vadodara for registration and further investigation into the case was made by Police Inspector Mr. Gohil. During the course of investigation, inquest was held on the dead bodies and the dead bodies were sent for post mortem examination. Further, the blood stained clothes of the appellant and dagger used by him in commission of crime were recovered under different panchnamas which were prepared in the presence of independent witnesses. The panchnama of place of occurrence was also drawn and the incriminating articles were sent to Forensic Science Laboratory for the purpose of analysis. On receipt of report and completion of investigation, the appellant was chargesheeted of the offence punishable u/S. 302 of the Indian Penal Code in the Court of Ld. Judicial Magistrate First Class, Vadodara. As the offence punishable u/S. 302 of the Indian Penal Code is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Vadodara for trial where it was numbered as Sessions Case No. 3/1992.

3. The charge at Exh.1 was framed by the Ld. Addl. Sessions Judge, Baroda against the appellant of the offence punishable u/S. 302 of the Indian Penal Code.

The charge was read over and explained to the appellant who pleaded not guilty to the same and claimed to be tried. The prosecution therefore, examined (1) Vandanaben Prabhakar P.W. 1 Exh.6, (2) Dr. Vaishakhiben Niranjan Dave P.W.2 Exh. 8, (3) Satishchandra Dinanath Sharma P.W.3 Exh. 11, (4) Rajnikant Nathalal Gandhi P.W. 4 Exh.12, (5) Hasumatiben Mohanlal P.W.5 Exh. 15, (6) Subhashbhai Manilal Soni P.W.6 Exh.16, (7) Lalabhai Ambalal Mistry P.W.7 Exh.18, (8) Ramanlal Purshotamdas Thakkar P.W.8 Exh. 19, (9) Rameshbhai Gordhanbhai Baria P.W.9, Exh. 23, (10) Mahendrabhai Motibhai Patwa P.W. 10 Exh.26, (11) Amarsinh Purshottamdas P.W.11 Exh.29, (12) Sudan Kishan Kahar P.W.12 Exh.30 (13) Somabhai Fatabhai P.W. 13 Exh.33, (14) Motisinh Chhatrasinh Padhiyar P.W. 14 Exh. 34 and (15) Raysinh Shivubha Gohil P.W.15 Exh. 37, to prove its case against the appellant. The prosecution also produced documentary evidence such as P.M. notes relating to deceased Madhuben and deceased Bhavika, panchnama of place of incident, complaint lodged by Vandanaben, panchnama of place of occurrence, recovery panchnamas, report of Serologist, etc. in support of its case against the appellant. After recording of evidence of prosecution witnesses was over, the Ld. Judge explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement the appellant claimed that he was innocent, but did not examine any witness in support of his defence. However, he submitted written submissions at Exh. 41 for consideration of the Court.

4. On appreciation of evidence adduced by the prosecution, the Ld. Judge held that it was proved by the prosecution beyond reasonable doubt that deceased Madhuben as well as deceased Bhavika had died homicidal death. The Ld. Judge noticed that no direct evidence was led by the prosecution to prove charge against the appellant and that the whole case was based on circumstantial evidence. The Ld. Judge held that the prosecution was successful in proving that the appellant had suspicion about the character of his wife as well as that he was not father of deceased Bhavika and had strong motive to commit the crime in question. The Ld. Judge further held that it was proved by the prosecution that at the time of incident, the appellant was staying with his wife and children and that no-one else was residing with the appellant. According to the Ld. Judge on the date of incident, the appellant was brought down from his house situated on the second floor and that two dead

bodies i.e. dead body of his wife and dead body of his daughter were found in the house covered with a bed sheet. The Ld. Judge deduced that it was proved by the prosecution beyond pale of doubt that the appellant had refused to open the doors of the house and that on persuasion of the police, he had opened the doors of the house and was found in the house. The Ld. Judge noticed that the appellant had not raised shouts on seeing dead bodies of his wife and daughter nor informed persons residing nearby nor informed his relatives nor informed the police and this was a circumstance against the appellant. The Ld. Judge found that it was established by the evidence on record that the appellant had hidden himself in the house near the dead bodies of his wife and daughter and had covered the dead bodies with a bed sheet. The Ld. Judge further held that the recovery of dagger below suitcase from the house of the appellant indicated that an outsider had not caused death of the two deceased, but that the appellant was the person who had caused the death of his wife and daughter. The Ld. Judge referred to the extra judicial confession made by the appellant before his sister and held that the said circumstance was consistent with the guilt of the accused. Further after referring to the evidence of Serologist the Ld. Judge held that the clothes of the appellant were found having same blood group as that of the deceased which in turn established that the appellant was in the close proximity of his wife and daughter when they were fatally wounded and that the appellant had every opportunity of committing the crime in question. The Ld. Judge noticed that cumulative effect of the circumstances established on the record unerringly pointed out that the appellant and the appellant alone was the person who had committed murder of his wife and daughter. In view of the above referred to conclusions, the Ld. Judge by judgment dated August 19, 1992 has convicted the appellant of the offence punishable u/S. 302 of the Indian Penal Code and imposed sentence which is referred to earlier, giving rise to the present appeal.

5. Ms. Shilpa J. Unwala, learned counsel for the appellant, after taking us through the entire evidence on record, submitted that the circumstances sought to be relied upon by the prosecution are not satisfactorily established and, therefore, the appellant is entitled to a reasonable benefit of doubt. According to the learned counsel for the appellant, the prosecution has failed to prove that the appellant had suspicion about the character of his wife and as motive which is one of the most important ingredients in a case based on

circumstantial evidence is not proved, the judgment impugned should be reversed. The learned counsel pleaded that the appellant being husband of deceased Madhuben would naturally be in her company and, therefore, the circumstance that the appellant was in the company of deceased should not be treated as a circumstance against the appellant. What was claimed was that the extra judicial confession is not proved by the prosecution as required by law and should not have been taken into consideration by the Ld. Judge of trial Court while assessing the circumstantial evidence against the appellant. According to the learned counsel it was not established by the prosecution that the blood stained clothes produced by Prabhakarbhai in presence of panch witnesses in fact belonged to the appellant and, therefore, find of blood on the clothes having the same group as that of the deceased should have been ignored by the Ld. Judge while considering the circumstances relied upon by the prosecution. According to the learned counsel for the appellant, suspicion however strong cannot be allowed to take place of proof and as the case against the appellant is not proved beyond reasonable doubt, the appeal should be accepted.

6. Mr. D.P. Joshi, Ld. APP submitted that the evidence of Vandanaben Prabhakar P.W.1 Exh.6, Satishchandra Dinanath Sharma P.W.3 Exh.11, Rajnikant Gandhi P.W.4 Exh.12 and Amarsinh Purshottamdas P.W.11 Exh.29 proves beyond reasonable doubt that the appellant was having suspicion regarding character of his wife and that he had strong motive to commit the murder of his wife as well as that of his daughter because the appellant had also suspicion that he was not the father of girl Bhavika. The learned counsel for the State further argued that the appellant was residing with the deceased Madhuben and daughter Bhavika which shows that he had ample opportunity to commit the crime in question. According to the Ld. APP the fact that two dead bodies were found from the premises occupied by the appellant on September 21, 1991 and that the appellant was in the house proves that no outsider had committed murder of the deceased, but the appellant was responsible for causing their deaths and, therefore, the appeal should be dismissed. What was claimed by the learned counsel for the State was that September 21, 1991 was Ganesh immersion day and others residing in the Faliya where the appellant is residing had gone to see procession, whereas the appellant was in his house and as the appellant was brought down by the police after persuasion and was arrested from the place, no benefit of doubt as claimed by the learned counsel for the appellant should be given

to the appellant. After referring to the extra judicial confession made by the appellant to his sister the Ld. APP for the State submitted that the extra judicial confession clinchingly proves the motive which prompted the appellant to commit the crime in question and is not hit by the provisions of Section 26 of the Evidence Act as is contended by the learned counsel for the appellant. It was further stressed that the report of the Serologist proved that the clothes of the accused produced by Prabhakar in presence of panch witness Mahendrabhai Patwa P.W. 10 Exh. 26 were stained with blood having same group as that of the deceased which in turn establishes that the appellant was in close proximity of the deceased when they were fatally wounded and that the appellant had all opportunity to commit their murders. The learned counsel referred to in detail the further statement of the appellant recorded by the Ld. Judge u/S. 313 of the Code of Criminal Procedure, 1973 and submitted that not only the appellant has not given any explanation to the circumstances proved by the prosecution, but has taken a false defence of insanity which should be treated as an additional link for completing chain of circumstances proved by the prosecution and, therefore, the appeal being without any substance should be dismissed.

7. We have taken into consideration the lengthy submissions advanced at the bar and have reappreciated the whole evidence on record to assure us whether the conviction of the appellant u/S. 302 of the Indian Penal Code recorded by the Ld. Addl. Sessions Judge is correct or not.

8. The fact that the deceased Madhuben who was wife of the appellant had died a homicidal death is not disputed by the appellant. Even otherwise the said fact stands amply proved by the evidence of Dr. Vaishakhiben Niranjanbhai Dave P.W.2 Exh.8. Dr. Dave in her substantive evidence before the Court has stated that on September 23, 1991 she was performing duties as Assistant Professor in Forensic Medicine and that the dead body of deceased Madhuben Bhikhajirao was brought before her for the purpose of post mortem examination. The doctor has stated that on post mortem examination she had found 27 external injuries and 3 internal injuries which were corresponding to external injuries nos. 10, 11 and 12. The doctor was shown Muddamal knife produced on the record of the case and after seeing the knife the doctor has stated that external injuries nos. 10, 11 and 12 were possible by the Muddamal knife. The doctor has further stated that external injuries nos. 10, 11 and 12 were sufficient in the ordinary course of nature to cause

her death. According to the doctor, the cause of death of deceased Madhuben was shock due to injuries on vital organs and haemorrhage. The doctor has further stated in her evidence that she had also performed post mortem examination on the dead body of deceased Bhavika and that she had found 7 external injuries as well as 6 internal injuries. The doctor has stated that the internal injuries were corresponding to external injuries and that external injuries nos. 1, 2, 3 and 4 were sufficient in the ordinary course of nature to cause her death. The doctor after seeing Muddamal knife stated that all the external injuries found on the dead body of deceased Bhavika were possible by the said knife. According to doctor, the cause of death of deceased Bhavika was shock following injuries on vital organs and haemorrhage. Further the injuries which were found on the dead body of deceased Madhuben are elaborately noted in inquest panchnama Exh.13, which was proved through the evidence of panch witness Rajnikant Nathalal Gandhi. Witness Rajnikant Nathalal has also referred to in detail in his substantive evidence before the Court, the injuries which were found on the dead body of deceased Madhuben. Similarly the injuries which were found on the dead body of deceased Bhavika are also stated in detail in inquest panchnama Exh.14 which was prepared in presence of independent panch witnesses. There is no manner of doubt that brutal murders of Madhuben and Bhavika were committed. Having regard to the evidence led by the prosecution, we are of the opinion that the Ld. Judge was justified in holding that it was proved by the prosecution beyond reasonable doubt that both the deceased had died a homicidal death and the said finding being just, is hereby upheld.

9. As observed earlier, the prosecution has not claimed that the incident in question was witnessed by any one and no direct evidence relating to involvement of the appellant with the murders of his wife and daughter is tendered before the Court. Admittedly the whole case against the appellant rests on circumstantial evidence. The law relating to circumstantial evidence is well settled. In dealing with circumstantial evidence there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Therefore, the Court has to be watchful and ensure that conjecture and suspicion do not take place of legal proof. In cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused.

The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis except the one to be proved against the accused. There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the Court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of these facts taken together conclusively establishes the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves, is or are not decisive. Where a case rests squarely on the circumstantial evidence, various sets of circumstantial evidence should be taken into consideration and their total effect should be such that they must lead unerringly to the guilt of the accused. Each fact must be proved individually and only thereafter the sum total of the proved facts has to be taken into consideration. But this does not mean that before the prosecution can succeed in a case resting upon the circumstantial evidence alone, it must prove each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. In Sharad v/s. State of Maharashtra AIR 1984 S.C. 1622, after referring to earlier case law, the Supreme Court has summarized the conditions to be fulfilled in a case based on circumstantial evidence as under :-

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may" be established.
(2) The fact so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, that should not be explainable on any other hypothesis except that the accused is guilty.
(3) The circumstances should be of conclusive nature and tendency.
(4) They should exclude every possible hypothesis except the one to be proved.
(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the

accused, and

(6) Where the various links in a chian are themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court.

10. If the aforesaid various conditions are fulfilled, only then a Court can use a false explanation or false defence as an additional link and not otherwise. As observed earlier, if the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to benefit of doubt. However, in applying this principle, distinction must be made between facts, called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way. It has to consider the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused missing or not and in dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing link in the case, it is not essential that every one of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions the Court must have regard to the common course of natural events to human conduct and their relations to the facts of the particular case.

11. In the light of the above referred to principles, we will now consider the question whether the case against the appellant is proved or not. The first circumstance which is sought to be proved by the prosecution against the appellant is that the appellant was married to deceased Madhuben and that at the time of incident he was staying separate in the company of his wife and children. So far as this circumstance is concerned, we find that Vandanaben Prabhakar P.W.1 Exh.6 has stated in her substantive evidence before the Court that the appellant was residing with his wife and children on second floor of a house situated in Fatepura area of Vadodara city. Again witness Amarsinh Purshottamdas P.W.11 Exh. 29 in his substantive evidence before the Court has stated that at the time of incident the appellant was residing with his wife and children on the second floor of house belonging to one Rajnikant and that no one else was residing with the appellant. In his further statement recorded u/S. 313 of the Code of

Criminal Procedure also the appellant has admitted that he was residing with his wife and children on second floor of a house situated in Fatepura area. The assertion made by witness Vandanaben Prabhakar and witness Amarsinh that the appellant was residing with his wife and children on the second floor of the house situated in Fatepura is not challenged by the appellant at all. Therefore, we are of the opinion that the Ld. Judge was justified in holding that it was proved by the prosecution beyond shadow of doubt that the appellant was residing with his wife and children on the second floor of the house which was situated in Fatepura area of Vadodara city.

12. The second circumstance which is sought to be proved by the prosecution against the appellant is that appellant was having suspicion that his deceased wife Madhuben had illicit relations with witness Satishchandra Dinanath Sharma and that he was not the father of minor Bhavika. In this regard we notice that Vandanaben Prabhakarrao P.W.1 Exh.6 has stated in her evidence that though she had come to the house of the appellant on receipt of information from the inmates of Faliya where her brother was residing, she had not lodged complaint against her brother i.e. the present appellant. From the record of the case it is evident that she being real sister of the appellant has not supported the prosecution case and, therefore, after declaring her as a hostile witness, she was permitted to be cross-examined by the Ld. APP. During the course of cross-examiantion by the Ld. APP the witness denied that she had stated in her complaint that she was informed that her brother had closed doors of the house from inside and that she should take out her sister-in-law and children of the appellant and that on learning this fact she had immediately gone to the house of the appellant on the scooter of her husband. She has also denied to have stated in her complaint that on inquiry being made, the appellant had informed her that his wife Madhuben had illicit relations with Satishchandra Sharma, who was residing near cross roads of Fatepura and as he was not father of daughter Bhavika and Lalo, he had killed his wife and daughter Bhavika by inflicting knife blows, whereas Lalo was at the house of his nephew Govindbhai. During the course of cross-examination by the defence, the witness in no uncertain terms admitted that as soon as she had reached the police station, her complaint was reduced to writing. Police Inspector Raysinh Gohil P.W.15 Exh.37 in his substantive evidence before the Court has stated that after taking the appellant and his sister Vandanaben to Fatepura Police Chocky, he had recorded the complaint of

Vandanaben as narrated by her and that the same was sent to City Police Station for the purpose of registration. This assertion made by the Police Inspector is not challenged by the appellant during his cross-examination at all. Under the circumstances, it is reasonable to hold that Vandanaben had gone to Fatepura Police Chocky where her complaint was recorded by the Police Inspector Raysinh Gohil as stated by her. The complaint lodged by witness Vandanaben is produced on record of the case at Exh. 7. In the complaint Vandanaben has specifically stated that his brother had suspicion that his wife was having illicit relations with Satishchandra Sharma and that he had not fathered the children. Further witness Satishchandra Sharma P.W.3 Exh. 11 in his substantive evidence before the Court has stated that when the appellant was brought down from the second floor of his house, witness Vandanaben had tried to know from the appellant as to what he had done and thereupon the appellant had stated to her that he had become victim of suspicion. However, in our view this part of his evidence cannot be taken into consideration as at that time the police officers were present and therefore the statement would be hit by the provisions of Section 26 of the Evidence Act. But we find that during the cross-examination of the witness it was suggested by the defence itself that quarrels were taking place between him and his wife Vimlaben as his wife Vimlaben was persuading him to give up his relations with deceased Madhuben. It was also suggested to this witness that quarrels were often taking place between deceased Madhuben and the appellant because of him and that the appellant was beating his wife. The evidence of witness Rajnikant Nathalal Gandhi P.W.4 Exh.12 shows that in her presence the appellant had informed his sister Vandanaben that as he had suspicion about relations of his wife with Satishchandra Sharma, he had killed his wife and daughter Bhavika, but this part of the evidence cannot be considered in view of the provisions of Section 26 of the Evidence Act. However, in the cross-examination of this witness also it was suggested on behalf of the appellant that Satishchandra Sharma was quarreling with his wife Vimlaben as Satishchandra Sharma had relations with deceased Madhuben. A reasonable reading of the evidence discussed above establishes, in our opinion beyond shadow of doubt that the appellant was entertaining a suspicion that his wife had illicit relations with Satishchandra Sharma and he had also suspicion that he was not the father of girl Bhavika. Thus, the prosecution has successfully proved that there was strong motive for the appellant to commit murders of his wife and minor Bhavika.

13. The third circumstance which is sought to be proved by the prosecution against the appellant is that the dead bodies of deceased Madhuben and deceased Bhavika were found from the house of the appellant on September 21, 1991 and that at that time the appellant was in the house. Vandanaben Prabhakar P.W.1 Exh.6 has clearly stated in her evidence that she in the company of police and others had gone on the second floor of the house of the appellant and that she had seen dead bodies of deceased Madhuben and deceased Bhavika lying on the floor. She has further stated that the dead bodies were covered with a bed sheet. Witness Satishchandra Dinanath P.W.3 Exh.11 has in his substantive evidence stated that the police had taken him and others on the second floor of the house where the appellant was residing and that the police had got opened the doors and that the dead bodies of Madhuben and her daughter were lying on the floor of the house. The witness has further stated that the dead bodies were kept in such a manner as if they were made to sleep and that the dead bodies were covered with a bed sheet. The witness has in no uncertain terms stated that the appellant was brought down from the house where the dead bodies were found and that on inquiry being made by his sister the appellant had stated that he had become victim of suspicion. Similarly the evidence of Rajnikant Nathalal P.W. 4 Exh.12 proves that alongwith the police he had gone to the house of the appellant and that he had found the dead bodies of deceased Madhuben and deceased Bhavika lying on the floor of the house. What is claimed by this witness is that the door was closed from inside by the appellant and on assurance by the police that the appellant would not be ill-treated, the appellant had opened the doors of the house and was brought down by the police. Again the evidence of Lalabhai Ambalal Mistry P.W.7 Exh. 18 proves beyond reasonable doubt that on the day of Ganesh immersion he was on duty as fireman at Dandiya Bazar Fire Brigade Station and that he in the company of two constables and P.S.I. had gone to the house of the appellant and had found the two dead bodies lying there. The witness has stated before the Court that he had physically lifted the dead body of the girl as a result of which his clothes were blood stained. Further the evidence of Ramanlal Parshottamdas Thakkar P.W.8 Exh.19 establishes that on Septemer 23, 1991 he was called as a panch witness and when he had gone to the house of the appellant, he had found two dead bodies lying on the floor of the house which were covered with a bed sheet. The discussion of above referred to evidence clinchingly establishes that the dead bodies of Madhuben and that of

deceased Bhavika were found from the house of the appellant on September 21, 1991 and the dead bodies were covered with a bed sheet.

14. The fourth circumstance which is sought to be proved by the prosecution against the appellant is that the appellant was in the house when the dead bodies of his wife and daughter were found from the house. In this regard, we find that witness Rajnikant Nathalal Gandhi P.W.4 Exh.12 has categorically stated that the appellant was sitting in gallery and when others had tried to climb staircase of his house, the appellant had gone inside the house and closed the doors of his house from inside. Witness Amarsinh Parshottamdas P.W.11 Exh. 29 has also stated in para. 2 of his substantive evidence before the court that he had seen the appellant standing in gallery of his house and when Satishchandra Sharma and others had tried to go to the house of the appellant through staircase, the appellant had closed doors of his house from inside. Further the witness has stated that all other persons residing in the Faliya had gone to Ganesh immersion procession where the appellant was not present at all. As observed earlier the witnesses have stated in their evidence that the police had brought down the appelalnt from the house after persuasion and that at that time no one else was found in the house of the appellant. Thus, in our view, the prosecution has satisfactorily established beyond reasonable doubt that the dead bodies of wife of the appellant i.e. deceased Madhuben and minor girl Bhavika were found from the premises occupied by the appellant on September 21, 1991 and that at that time the appellant was in the house. So far as extra judicial confession alleged to have been made by the appellant to his sister in presence of witnesses is concerned, we find that it is a weak piece of evidence and is of no assistance to the prosecution since Vandanaben, who is sister of the appellant has denied that any such confession was made to her. Further we find that at the time of making of alleged confessional statement the police officers were also present and, therefore, such a confessional statement would be hit by the provisions of section 26 of the Evidence Act. Under the circumstances the so called confession made by the appellant that he had killed his wife and daughter cannot be taken into consideration at all and we have ignored the same.

15. The fifth circumstance which is sought to be relied upon by the prosecution is that the clothes of the appellant which were recovered were found blood stained and that blood on those clothes was found to be of the

same group as that of the deceased. The learned counsel for the appellant vehemently argued that according to the prosecution the clothes were produced by Prabhakar, who is husband of Vandanaben, in the presence of witness Mahendra Motilal Patwa P.W.10 Exh.26 and as Prabhakar, who is brother-in-law of the appellant, was not examined, the identity of the clothes as belonging to the appellant is not established and, therefore, the circumstance that the clothes of the appellant were stained with the blood having the same blood group as that of the deceased should not be taken into consideration by the Court. In this regard we have minutely examined the evidence regarding recovery of the clothes of the deceased. Witness Mahendrabhai M. Patwa P.W.10 Exh.26 has stated in his substantive evidence that he was called as a panch witness on September 23, 1991 and that he knows the appellant. The witness has further stated that the appellant is staying in Pitamber Pole and that the clothes of the appellant were Khakhi coloured. According to this witness, the police had taken possession of the clothes of the appellant in his presence and that the clothes were having red coloured stains. We may state that though this witness was cross-examined on behalf of the appellant, it was never suggested to the witness that he was not known to the appellant or that he was also not familiar with the clothes of the appellant. The evidence of Police Inspector Raysinh Shivubha Gohil indicates that the clothes of the appellant were produced before him in the presence of panch witness by Prabhakar and that the same were seized under a panchnama. It is relevant to notice that the clothes of the appellant were recovered from the house of the appellant and not from any other place. Further the description of the clothes mentioned in recovery panchnama Exh.28 would indicate that the clothes were Khakhi coloured and probably the official dress of the appellant who was driver employed with State Road Transport Corporation. It is not suggested by the appellant to any of the witnesses that some intruder had come to his house and placed the clothes in a bucket from where Prabhakar Rao had produced the clothes before Police Inspector Mr. Gohil in presence of panch witness Mr. Patwa. Thus, reading the evidence regarding recovery of clothes of the appellant, we are satisfied that the identity of the clothes as belonging to the appellant is fairly established by the prosecution and it is wrong to contend that in absence of examination of Prabhakar Rao as one of the prosecution witnesses the Ld. Judge was not justified in holding that the clothes recovered were belonging to the appellant. The report of the Serologist would indicate that blood group of the appellant is "B", whereas blood group of both the

deceased is "A" and on the clothes of the appellant blood group of the deceased was found. This would indicate that the appellant was in close proximity of the deceased when they were fatally wounded and that the appellant had all the opportunity of committing their murders.

16. The above referred to discussion establishes that the prosecution has proved following circumstances beyond reasonable doubt against the appellant :-

(1) The appellant was residing with his deceased wife Madhuben and deceased daughter Bhavika and none else was staying with the appellant.

(2) The appellant was having suspicion that his wife had illicit relations with Satishchandra Sharma and that he was not the father of girl Bhavika.

(3) The dead bodies of wife of the appellant and his daughter were found from the premises in possession of the appellant on September 21, 1991 and that at that time the appellant was in the house.

(4) On names being called out of the two deceased by the witnesses, the appellant had closed the doors of the house from inside and had opened the doors only after persuasion by the police officers.

(5) From the place of incident itself the appellant was taken to the police chocky where he was apprehended.

(6) On noticing the dead bodies of his wife and daughter in his house, the appellant had not raised shouts nor informed his relatives nor neighbours nor lodged any complaint with the police.

(7) The clothes of the appellant were found stained with blood having the same group as that of the deceased which establishes that the appellant was in close proximity of the deceased at the time when they were fatally wounded and had all the opportunity of committing the crime in question.

17. We notice that the Supreme Court in (1) Vasa Chandrasekhar Rao v/s. Ponna Satyanarayana, (2000) 6 S.C.C. 286 and (2) Geetha v/s. State of Karnataka (2000) 10 S.C.C. 72 while explaining law regarding

circumstantial evidence has ruled that where circumstances proved are put to the accused through his examination u/S. 313 of the Code of Criminal Procedure and the accused merely denies the same, then such denial would be an additional link in the chain of circumstances to bring home the charge against accused. As indicated earlier, it is proved by cogent and reliable evidence that the appellant was with his deceased wife and deceased daughter on the day of incident and that none else was residing with them. Therefore, if the death occurs of the wife and daughter in a suspicious circumstances, a reasonable explanation was expected from the appellant. Here in this case incriminating circumstances proved were put to the appellant and in his further statement u/S. 313 of the Code of Criminal Procedure he has merely denied the same. Therefore, such denial on the part of the appellant and non-explanation about the suspicious circumstances in which his wife and daughter had died, will have to be treated as an additional link in the chain of circumstances to bring home the charge against the appellant. Further we find that the appellant has taken the defence that he was of unsound mind at the time of incident and that he was not liable to be convicted for the murder of his wife and daughter. This defence is suggested to almost all the witnesses including witness Vandanaben Prabhakar, who is his sister. We may state that insanity to be recognized as an exception to crime liability must be such as to disable an accused person from knowing the character of the act he was committing when he commits a criminal act. The burden of proof that the mental condition of the accused was at the crucial point of time such as is described by Section 84 of the Indian Penal Code lies on the accused who claims the benefit of the said exemption. We notice that no evidence worth the name is adduced by the appellant to establish that at the time of incident he was of unsound mind. On the contrary, the evidence on record establishes satisfactorily that the appellant was employed as a driver with State Road Transport Corporation and was discharging his duties as such and that it was never reported by any one that he was of unsound mind. Thus, there is no manner of doubt that the appellant had taken a false plea in his defence and raising of such a false plea will also have to be treated as an additional link in the chain of circumstances to prove the charge against the appellant.

18. The cumulative effect of the circumstances proved above clearly establishes that in all human probability the act of commission of murder of deceased Madhuben and deceased Bhavika was done by the appellant and the

appellant alone. The circumstances proved establish guilt of the appellant beyond reasonable doubt. The circumstances established on the record of the case are not consistent with the innocence of the accused and they are consistent only with the guilt of the appellant. Under the circumstances, the decision rendered by the Ld. Judge of the trial Court to the effect that the appellant had committed murder of his wife and daughter being eminently just, will have to be upheld.

19. The net result of the above discussion is that the prosecution has proved beyond reasonable doubt that the appellant had committed murder of his wife as well as that of his daughter on September 22, 1991 and his conviction u/S. 302 of the Indian Penal Code is hereby upheld. The appeal filed by the appellant is, therefore, dismissed.

20. The Muddamal articles to be disposed of in terms of the direction given by the Ld. Judge in the impugned judgment.

[J.M. PANCHAL, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.